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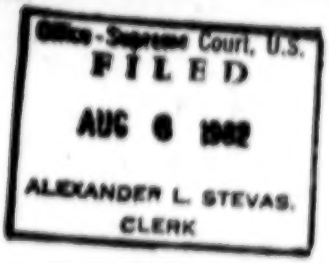

No.

In the

Supreme Court of the United States

October Term, 1981

PAUL L. MANNING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Filed August 6, 1982

QUESTIONS PRESENTED

I. Under Garner v. U.S., 424 U.S. 648 (1976), can the Fifth Amendment privilege against self-incrimination constitute a defense to a charge of failure to file a federal income tax return, 26 U.S.C. §7203, when the privilege is asserted to avoid incrimination for a past tax violation? (The Ninth Circuit holds yes; the Fourth Circuit holds no.)

II. In a prosecution for failure to file a federal income tax return, is a defendant entitled to a good-faith, though erroneous, claim of Fifth Amendment defense under Garner v. U. S., 424 U.S. 648 (1976)? (The Ninth Circuit holds yes; the Fourth, Eighth and Tenth Circuits hold no.)

III. Does a federal tax return which supplies some financial information and supplies zero as to tax due and owing constitute a tax return under 26 U.S.C.

§7203? (The Ninth Circuit holds yes; the Fourth and Tenth Circuits hold no.)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO.

PAUL L. MANNING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the order of June 8, 1982 of the United States Court of Appeals for the Fourth Circuit, which order denied Petitioner's Motion for Rehearing en banc, and to review the Judgment of May 7, 1982 of said court which Judgment affirmed the conviction of this Petitioner.

OPINION BELOW

Petitioner appealed his conviction from U. S. District Court in the Western District of North Carolina to the U. S. Court of Appeals for the Fourth Circuit. In an unpublished opinion decided May 7, 1982, the Fourth Circuit, without any citation of case law, affirmed the conviction. (Appendix A.) The Court held that:

(1) Petitioner faced no real threat of criminal prosecution so as to warrant his Fifth Amendment claim against self-incrimination on his tax return for 1976.

(2) Notwithstanding the criminal tax investigation of Petitioner, Petitioner's conduct was not protected by the Fifth Amendment as to his claim of privilege on his return for 1977 or 1978.

(3) Jury charges given by the District Court to the effect that Defendant was to be acquitted if the jury found that he was honestly mistaken in his belief was tantamount to an instruction that a good faith claim of the Fifth Amendment, however erroneous, is a defense and grounds for acquittal.

Petitioner's Motion for Rehearing or in the Alternative, Rehearing en banc, and Motion for Stay of Mandate Pending the filing of a Petition for Writ of Certiorari were denied by the Court's order of June 8, 1982. (Appendix B.)

JURISDICTION

The final judgment of the Court of Appeals was entered on June 8, 1982. This petition is timely filed within sixty (60) days of the final judgment of the lower court. Jurisdiction of this court is invoked under Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Under Garner v. U.S., 424 U.S. 648 (1976), can the Fifth Amendment privilege against self-incrimination constitute a defense to a charge of failure to file a federal income tax return, 26 U.S.C. §7203, when the privilege is asserted to avoid incrimination for a past tax violation? (The Ninth Circuit holds yes; the Fourth Circuit hold no.)

II. In a prosecution for failure to file a Federal Income tax return, is a defendant entitled to a good-faith, though erroneous, claim of Fifth Amendment defense under Garner v. U.S., 424 U.S. 648 (1976)? (The Ninth Circuit holds yes; the Fourth, Eighth and Tenth Circuits hold no.)

III. Does a Federal tax return which supplies some financial information and

supplies zero as to tax due and owing constitute a tax return under 26 U.S.C. §7203? (The Ninth Circuit holds yes; the Fourth and Tenth Circuits hold no.)

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States:

> No person shall . . . be compelled in any criminal case to be a witness against himself . . . .

STATEMENT OF THE CASE

Petitioner was charged under a three count information of willful failure to file an individual federal income tax return for the years 1976, 1977 and 1978, in violation of 26 U.S.C. §7203.

Petitioner raised, pretrial, the issue of whether or not the tax returns he filed, upon which he made specific Fifth Amendment objections, constitute

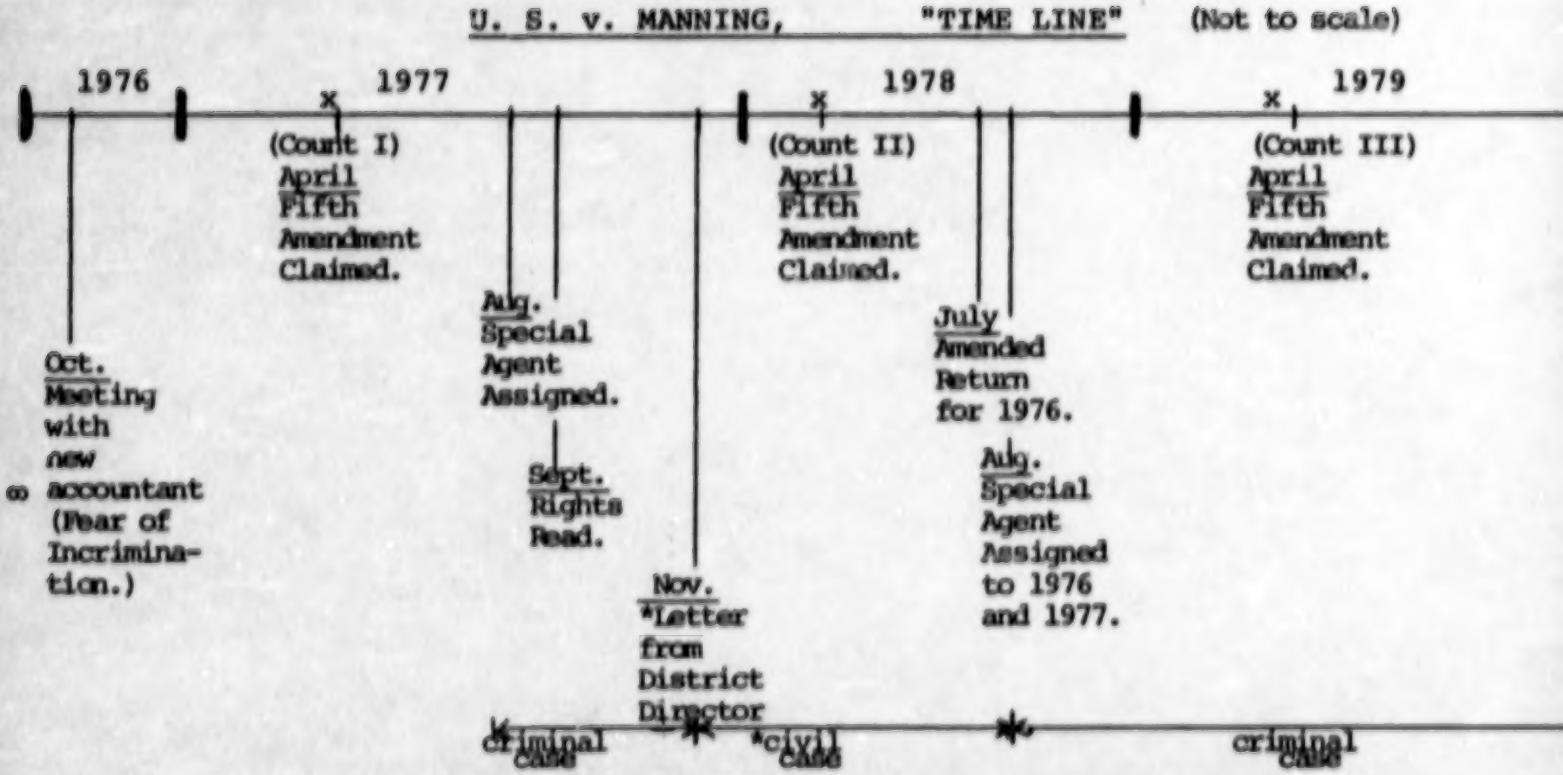
tax returns under Garner v. U.S., 424 U.S. 648 (1976). After an in camera consideration, the District Court found that Petitioner's Fifth Amendment claim was not bona fide, and the case was tried before a jury, which returned a verdict of guilty on all three counts.

Throughout the trial, Petitioner urged the court that his "defense" was the claim of the Fifth Amendment in good faith, however erroneous, under Garner, supra. Repeatedly, the court failed to recognize any such defense, and refused to instruct the jury as requested by Petitioner: Defendant could not be convicted for an erroneous claim of the Fifth Amendment privilege asserted in good faith.

Petitioner's claim of privilege entered upon the Form 1040 for 1976 (Count I) was based upon his belief

that his prior returns contained serious errors for which he might be criminally prosecuted, and that information supplied upon his subsequent return might then be used a gainst him. Paradoxically, his Fifth Amendment claim lead to assignment by the Internal Revenue Service (IRS) of a Special Agent of the Criminal Investigation Division, who, during his visit with Petitioner in the summer of 1977, read Petitioner his rights under the Fifth Amendment: right not to say anything or produce any evidence; anything said and any documents produced might be used against Petitioner in any criminal proceeding. (See time line of events on the following page.)

A few months after Petitioner was read his rights, he was informed by IRS that his case was no longer criminal, yet IRS was not precluded from reopening


U. S. v. MANNING, "TIME LINE" (Not to scale)
1976
1977
1978
1979
(Count I) April Fifth Amendment Claimed.
(Count II) April Fifth Amendment Claimed.
(Count III) April Fifth Amendment Claimed.
Oct. Meeting with new accountant (Fear of Incrimination.)
Aug. Special Agent Assigned.
Sept. Rights Read.
Nov. *Letter from District Director
July Amended Return for 1976.
Aug. Special Agent Assigned to 1976 and 1977.
criminal case
*civil case
criminal case

*The I. R. S. District Director's letter of November stated MANNING was no longer under criminal investigation for the year 1977, but that the I.R.S. was not precluded from re-opening the criminal case. (RT 320-1)

the criminal case. Still fearing use of the tax information against him in a criminal case, Petitioner again claimed the Fifth Amendment on a subsequent return the following April (Count II), and again his case was assigned to a Special Agent for criminal investigation. The agent was assigned to investigate Petitioner's returns for 1976 and 1977. And because of the ongoing criminal investigation, Petitioner again claimed the Fifth on his return the following April. (Count III).

On the other hand, believing that a corporate officer had no right to claim the Fifth as to corporate matters, Petitioner continued to file corporate returns.

Petitioner's return for 1976 contained some financial information as well as protest material, and showed

the amount of tax due and owing as zero, while the returns for 1977 and 1978 contained no financial information from which a tax could be computed. Petitioner also filed, in July 1978, an amended 1976 return in which he offered to amend further his return (supply detailed information) upon a grant of immunity under 18 U.S.C. §6002 and §6004.

Although the Prosecutor's position was that Petitioner claimed the Fifth Amendment in an effort to protest federal income taxes, Petitioner testified during the in camera proceeding and at trial, that his purpose was not to protest taxes, but was because of self-incrimination. In answer to the court's question, "If you were granted immunity right now, would you file with the Internal Revenue Department all your taxes up-to-date and pay them?"

Petitioner answered "yes, sir your honor, I would." (RT 9, Court of Appeals Appendix at 37.)

REASONS FOR GRANTING THE WRIT

1. Because of the importance of the constitutional question to tax law, and because of the express conflict between the federal circuit courts, this Court should decide whether the Fifth Amendment privilege against self-incrimination constitutes a defense to a charge of failure to file a federal income tax return when the privilege is asserted to avoid incrimination for a past tax violation.

2. Because of the importance of the constitutional question to tax law, and because of the express conflict between the federal circuit courts, this Court should decide whether a Defendant charged with failure to file a federal income tax

return is entitled to acquittal if his claim of privilege is made in good faith, however erroneous.

3. Because of the importance of the constitutional question to tax law, and because of the express conflict between the federal circuit courts, this Court should decide whether a federal tax return which supplies some financial information and supplies zero as the tax due and owing constitutes a tax return under 26 U.S.C. §7203.

I.

BECAUSE OF THE IMPORTANCE OF THE CONSTITUTIONAL QUESTION TO TAX LAW, AND BECAUSE OF THE EXPRESS CONFLICT BETWEEN THE FEDERAL CIRCUIT COURTS, THIS COURT SHOULD DECIDE WHETHER THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION CONSTITUTES A DEFENSE TO A CHARGE OF FAILURE TO FILE A FEDERAL INCOME TAX RETURN WHEN THE PRIVILEGE IS ASSERTED TO AVOID INCRIMINATION FOR A PAST TAX VIOLATION.

In the case of Garner v. U.S., 424 U.S. 648 (1976), this Court considered whether or not a taxpayer is compelled to make incriminating disclosures on the face of a federal income tax return because of the possibility of being prosecuted under 26 U.S.C. §7203 for failure to make a return. The Garner court held, at n. 18, 663, that said disclosures were not compelled because "a defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith." Nor could a defendant, according to the Garner holding, be convicted under a valid exercise of the Fifth

Amendment privilege. See also the concurring opinion of Justice Marshall, joined by Justice Brennan, at 666. And see U. S. v. Sullivan, 274 U.S. 259 (1927) (privilege against compulsory self-incrimination is not a defense to prosecution for failing to file a return at all).

Garner presented to this court the issue of a claim of privilege on a tax return "justified by a fear of self-incrimination other than under the tax laws." Garner, supra, n.3 at 650. The case at bar present the corollary: whether the privilege can be asserted to avoid incrimination for a past violation of income tax laws, an issue recently considered in the case of U.S. v. Carlson, 617 F.2d 518, 520 (9th Cir. 1980). See also U.S. v. Neff, 615 F.2d

1235 (9th Cir. 1980), and U. S. v. Ellis, 496 F.Supp. 76 (D. Kan. 1980) (good faith Fifth acquittal determined by trial court). Compare the analysis of other circuits: U.S. v. Farber, 630 F.2d 569 (8th Cir. 1980); U.S. v. Daly, 481 F.2d 28 (8th Cir. 1973)(per curiam), cert. denied, 414 U.S. 1064 (1973); U. S. v. Irwin, 561 F.2d 198 (10th Cir. 1977) cert. denied 98 Sup. Ct. 725 (1978); U. S. v. Campbell, 619 F.2d 765 (8th Cir. 1980); U.S. v. Johnson, 577 F.2d 1304 (5th Cir. 1978); U. S. v. Evanko, 604 F.2d 21 (6th Cir. 1979); U. S. v. Edelson, 604 F.2d 232 (3rd Cir. 1979); and U. S. v. Silkman, 543 F.2d 1218 (8th Cir. 1976) (per curiam) cert.denied 431 U.S. 919 (1977).

In Carlson, supra, the Ninth Circuit found that although the defendant

properly raised the Fifth Amendment on his tax return and was faced with a real and appreciable danger of self-incrimination with respect to a past tax violations, defendant's motive was directed more toward tax protest than to a valid claim against self-incrimination. For that reason, the court held that Carlson had "[taken] advantage of the privilege." 617 F.2d 522.

U. S. Court of Appeals for the Fourth Circuit in this case held that Petitioner:

> . . . faced no real threat of criminal prosecution. His proper course of action would have been to file an amended return showing the errors on his previous returns and to pay the back taxes that were owed. (Appendix A, App. 4)

Without so much as saying so, the Fourth Circuit reached the conclusion that Petitioner did not meet one of the tests

set forth by Carlson: Was the taxpayer faced with a real and appreciable danger of self-incrimination?

And as to the returns for 1977 and 1978, the Appellate Court further held that Petitioner's conduct was not protected by the Fifth Amendment because Petitioner's "ability to fill out returns was never a real issue." (Appendix A, App. 5.) The Court ruled in effect that the privilege could not be asserted to avoid incrimination for past tax violations, a ruling directly opposite to that of the Ninth Circuit.

II.

BECAUSE OF THE IMPORTANCE OF THE CONSTITUTIONAL QUESTION TO TAX LAW, AND BECAUSE OF THE EXPRESS CONFLICT BETWEEN THE FEDERAL CIRCUIT COURTS, THIS COURT SHOULD DECIDE WHETHER A DEFENDANT CHARGED WITH FAILURE TO FILE A FEDERAL INCOME TAX RETURN IS ENTITLED TO ACQUITTAL IF HIS FIFTH AMENDMENT CLAIM OF PRIVILEGE IS MADE IN GOOD FAITH, HOWEVER ERRONEOUS.

In Garner, supra, at 665, the mainstay of the court's ruling that Garner's tax return disclosures were not compelled testimony was the availability to Garner of a good-faith defense:

> We are satisfied that Murdock I [284 U.S. 141 (1931)] states the constitutional standard. What is at issue here is principally a matter of timing and procedure. As long as a valid and timely claim of privilege is available as a defense to a taxpayer prosecuted for failure to make a return, the taxpayer has not been denied a free choice to remain silent merely because of the absence of a preliminary judicial ruling on his claim. (Emphasis added.)

Far stronger was the concurring opinion, at 668, which opinion expressed a deep concern for lack of a preliminary ruling for a taxpayer who claims the Fifth Amendment on his return:

> If, contrary to the undisputed fact, a taxpayer had no assurance of either a preliminary ruling or a defense of good-faith assertion of the privilege, he

> could claim the privilege only at the risk that an erroneous assessment of the law of self-incrimination would subject him to criminal liability. In that event, I would consider the taxpayer to have been denied the free choice to claim the privilege, and would view any incriminating disclosures on his tax return as "compelled" within the meaning of the Fifth Amendment. Only because a good-faith erroneous claim of privilege entitles a taxpayer to acquittal under §7203, can I conclude that petitioner's disclosures are admissible against him. (Emphasis added.)

In other words, but for the good-faith erroneous claim of privilege defense, diclosures on a tax return would constitute compelled testimony.

The federal circuit courts are strongly split with respect to whether or not an individual who claims the Fifth Amendment objection on the face of a return is entitled to an instruction to the effect that a good-faith erroneous claim of the Fifth Amendment is

grounds for acquittal. The Ninth Circuit in Neff, supra, at 2259 and n. 3 at 2260, analyzed the disparity, holding that decisions of other circuits do not comport with the Garner holding, supra.

Whereas the Ninth Circuit applies "traditional Fifth Amendment analysis," Neff at 2260, the Eighth and Tenth Circuits, for example, Daly, Silkman, and Irwin, supra, apply circuitous logic: a return without sufficient information, albeit claim of the Fifth, is no return; no return requires application of Sullivan, supra; Sullivan holds that the Fifth Amendment will never justify a complete failure to file a return; the Fifth Amendment defense is thus invalidated, and no good-faith Fifth Amendment instruction is required. Add: the Fourth Circuit

decision in Petitioner's case. See also U. S. v. Foster, No. 76-3733 slip opinion (9th Cir. 1977) in which the Court reversed a §7203 conviction for lack of the Fifth Amendment instruction, despite defense counsel's failure to request same, the court finding plain error.

The obvious disparity among the circuits begs resolution by this Court.

III.

BECAUSE OF THE IMPORTANCE OF THE CONSTITUTIONAL QUESTION TO TAX LAW, AND BECAUSE OF THE EXPRESS CONFLICT BETWEEN THE FEDERAL CIRCUIT COURTS, THIS COURT SHOULD DECIDE WHETHER A FEDERAL TAX RETURN WHICH SUPPLIES SOME FINANCIAL INFORMATION AND SUPPLIES ZERO AS THE TAX DUE AND OWING CONSTITUTES A TAX RETURN UNDER 26 U.S.C. §7203.

In U. S. v. Long, 618 F.2d 74 (9th Cir. 1980), the court reversed a failure to file conviction as a matter of law where the individual had inserted zeros in spaces reserved for entering exemptions, income, tax,and tax withheld. The Long

court held that the zeros entered on a tax form constitute information relating to the taxpayers income from which a tax can be computed, and, therefore, the tax form constitutes a return. The court noted that even though the assessment to be calculated from the return by the IRS might be erroneous, said assessment was possible. The Tenth Circuit reached the opposite view in the case of U. S. v. Rickman, 638 F.2d 182 (10th Cir. 1980), as did the Fourth Circuit in the case at bar, with respect to Petitioner's 1976 tax return.

Petitioner's tax return for 1976 contained financial information for various line items, to include the tax line for which he submitted zero. See also Florsheim Bros. Dry Goods Co. v. U. S., 280 U.S. 453 (1930).

As the Ninth Circuit noted in Long, at 76:

> Nothing can be calculated from a blank, but a zero, like other figures, has significance. A return containing false or misleading figures is still a return. False figures convey false information, but they convey information.

CONCLUSION

For the reasons urged herein, it is respectfully requested that a Writ of Certiorari issue to review and reverse the Judgment entered herein by the U. S. Court of Appeals for the Fourth Circuit.

DATED this 12 day of August, 1982.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 81-5182

United States of America,

Appellee,

versus

Paul L. Manning,

Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Richard C. Erwin, District Judge.

Argued April 2, 1982 Dated May 7, 1982

Before HAYSNSWORTH, Senior Circuit Judge, WIDENER and CHAPMAN, Circuit Judges.

Donald MacPherson (Frederick Lutz on brief) for Appellant; James P. Springer, Tax Divsion, Dept. of Justice (Glenn L. Archer, Jr., Assistant Attorney General; Kenneth W. McAllister, United States Attorney on brief) for Appellee.

PER CURIAM:

Manning was convicted of willfully failing to file an income tax return for the years 1976, 1977 and 1978 in violation of 26 U.S.C. § 7203. Because we find no merit to the arguments that Manning raises on appeal, we affirm the judgment of the district court.

At trial, Manning testified that in October of 1976 he changed accountants. Manning's new accountant allegedly told him that his former accountant had made mistakes on Manning's previous returns and that he might have to pay additional taxes and penalties. In light of this information, according to Manning, he filed a 1976 return which only disclosed his name, address, social security number, number of dependents, federal income tax withheld, estimated tax payments and exemptions. In all of the other blanks

Manning either entered a zero or an asterisk. The asterisk indicated that he was objecting to the question on the basis of the First, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Thirteenth, Fourteenth and Sixteenth Amendments. Manning also attached over one hundred pages of protest literature to the form.

In 1978 Manning filed a document which purported to amend his 1976 return. This form contained the same information previously provided, but in the spaces provided for income, he wrote "Object: Self-Incrimination."

The forms submitted by Manning for 1977 and 1978 contained only his name, address, social security number and number of dependents. In all of the other blanks Manning wrote "Object: Self-Incrimination" or "none." When Manning submitted these forms he was under the

threat of criminal prosecution because of his 1976 return.

Manning's first claim on appeal is that he made a valid exercise of the Fifth Amendment on his 1976, 1977 and 1978 returns. As to the 1976 return, he argues that he properly exercised his Fifth Amendment right because he feared that the Internal Revenue Service could use information from that return to discover the alleged errors made in the previous returns. At this time, however, Manning faced no real threat of criminal prosecution. His proper course of action would have been to file an amended return showing the errors on his previous returns and to pay the back taxes that were owed.

As to the 1977 and 1978 returns, Manning argues that he claimed the Fifth Amendment because he was under investigation for his 1976 return. Manning claims

that if he had filled out these returns this would have provided the government with evidence in its criminal prosecution because it would have shown that Manning knew how to fill out a return. Manning's ability to fill out returns was never a real issue, however, because he had filed returns for his corporation and for himself in the years prior to 1976. Therefore, we find that Manning's conduct was not protected by the Fifth Amendment in 1976, 1977 or 1978.

Manning also claims that the district court erred by failing to instruct the jury that a good faith exercise of his Fifth Amendment right was a defense. The trial court did give a good faith instruction when it instructed the jury on willfulness, however. Under this instruction, the jury could not have convicted Manning if it believed that

Manning was honestly mistaken in his belief that he was not required to give the government any more information. We therefore find that the district court properly instructed the jury. The district court was not required to give the specific instruction that Manning requested.

We have considered the other arguments that Manning raises on appeal, and we find no merit in them.

In light of the foregoing, the district court's judgment is affirmed.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-5182

United States of America,)
Appellee,)
) ORDER
vs.)
)
Paul L. Manning,)
Appellant.)

Upon consideration of the petition for rehearing and the motion for stay of the mandate pending the filing of a petition for writ of certiorari, no one having requested a poll of the court on the suggestion of rehearing en banc,

IT IS NOW ORDERED that the petition for rehearing and the motion for a stay be, and each hereby is, denied.

With the concurrence of Judge Widener and Judge Chapman.

/s/ Judge Haynsworth
United States Senior
Circuit Judge

June 8, 1982

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari by depositing the same in the United States Mail, Phoenix, Arizona, with sufficient airmail postage prepaid affixed thereto, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Mr. Michael L. Paup
Chief, Appellate Section
Tax Division
United States Department
of Justice
Washington, D.C. 20530

this 6th day of August, 1982.

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PAUL L. MANNING